

ORIGINAL

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FILED
DISTRICT COURT OF GUAM
AUG 29 2006 *hba*
MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GUAM

11 UNITED STATES OF AMERICA,) CRIMINAL CASE NO. 05-00053-06
12 Plaintiff,) GOVERNMENT'S OBJECTION
13 vs.) TO PRESENTENCE REPORT
14 BRIAN WILLIAM ELM,)
15 Defendant.)
16 _____)

17
18 The United States objects to the failure of the Presentence Report to assess defendant a
19 four-level increase, pursuant to USSG 3B1.1(a), as the organizer and leader of a drug
20 organization that involved five or more persons. The Presentence Report failed to include the
21 lengthy and detailed testimony and documentary evidence adduced against the defendant at trial.
22 The brief and cursory summary of facts set forth in ¶ 36 is woefully inadequate to give this court
23 an accurate understanding of the scope of his criminal conduct.

24 Following is a brief summary of that testimony. Albert Mendiola, Jonathan Canovas and
25 Christopher Espinosa are natives of Guam who had moved to Las Vegas. They were related to,
26 acquainted with, or former school mates of Brian Elm, Chris Iager and John Cruz. At trial,

1 Mendiola testified that in 2003, he began shipping ice to Guam, to be distributed by Lager, a
2 friend of defendant's. Mendiola testified that as time progressed, he took on a partner in Las
3 Vegas, Canovas, who financed purchases of ice for profit. Mendiola would mail greeting cards
4 containing 3-5 grams each to Lager's post office box. Eric Aponik, defendant's brother in law,
5 was using ice during that time. He testified that in 2003-early 2004, defendant was providing
6 him with ice, which he believed came from Lager.

7 Sometime in late summer, 2004, before the school term began in Las Vegas, several of
8 these individuals were on island attending a bar-b-que at Aponik's residence. Canovas testified
9 that during the party defendant approached him about sending ice directly to him for distribution.
10 When Canovas returned to Las Vegas he began buying ice directly from Mendiolas' source and
11 mailing it to defendant's post office box. He gave defendant his Bank of Guam savings account
12 number, which was in his and his mother's name, and instructed defendant to deposit his share of
13 the proceeds into that account. Canovas identified the exact date he received his first payment,
14 October 13, 2004. A summary of his bank records, which was admitted at trial, is attached
15 hereto as Exhibit 1.

16 Aponik testified that in late 2004, he was repairing a warehouse belonging to the family
17 business, and hired defendant to help him. He testified that when he picked up the defendant one
18 day, the defendant asked him to stop at the Bank of Guam in Mangilao so he could make a
19 deposit. Defendant told him he was selling ice for Canovas, and depositing the proceeds into
20 Canovas' account. He testified that defendant was concerned that bank tellers would get
21 suspicious if the same person made cash deposits frequently, so Aponik agreed to make deposits
22 also. Aponik identified the next deposit for Canovas, \$800 on November 6, 2004, as one he
23 made on behalf of defendant.

24 Defendant asked Aponik to open a post office box for the receipt of Canovas' shipments,
25 because defendant shared his own post office box with his girlfriend. Aponik opened the box
26 November 18, 2004, and from that time forward, all the Las Vegas ice was sent there. The
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28

1 telephone toll records concerning Aponik, defendant and Canovas reflect dozens of calls between
2 them. Exhibit 2, attached hereto, is a sample of the pattern observed in these records. Defendant
3 had obtained his own cell phone when he began dealing with Canovas, but it did not have long-
4 distance service. Accordingly, when Canovas wanted to talk to defendant, he could call
5 defendant directly, but when defendant wanted to talk to Canovas, he would borrow Aponik's
6 cell phone. Thus, for example, defendant borrowed Aponik's phone to call Canovas at 11:16
7 a.m. on November 9, 2004, but when Canovas turned the call, he called defendant directly
8 because the call had been from the defendant, not Aponik.

9 Defendant was both distributing ice himself and through other individuals. John Cruz, a
10 mid-level dealer with about 20 customers of his own, testified he had been purchasing ice from
11 defendant almost daily, for \$450/gram. The cell phone records between Cruz and defendant were
12 introduced at trial. They reflect many daily calls between the two men during late 2004 and early
13 2005. Jarett Elm, defendant's cousin, received ice from him on many occasions. He testified
14 that he had never used ice until one day in late 2004, when he went to Aponik's warehouse to
15 visit and found Aponik and defendant smoking ice. Defendant offered Jarett a hit, and he was
16 hooked. He never observed either Aponik or defendant distributing to others, but he testified to
17 one occasion, when he walked into the warehouse and saw defendant and Aponik sitting at a
18 table with a load of ice and a scale.

19 (Note: by November, 2004, Albert Mendiola was no longer associated with Canovas, and
20 had had a falling out with Lager. Mendiola was using his brother Paul as the recipient for his ice
21 shipments. Both have been convicted for a shipment sent to Paul in February, 2005, Cr. No. 05-
22 00011.)

23 By late December, 2004, Canovas' friend, Espinosa, had started financing the shipments,
24 which were increasing in size. The method of returning proceeds had changed as well. Canovas
25 was concerned that his mother would become suspicious of large amounts moving through his
26 savings account, so he instructed defendant and Aponik to begin wiring money via Western
27

1 Union as well. The first wire transfer of drug proceeds was made by Aponik to Canovas and
2 Espinosa on January 2, and 3, 2005, respectively. Each man received \$3,000.

3 Defendant, who was on probation to the Superior Court of Guam, was ordered to serve a
4 jail sentence beginning March 18, 2005. Cruz testified that defendant told him he would be
5 going to jail, and that he should begin dealing directly with Aponik, who had agreed to resume
6 control of the organization. Aponik testified that after defendant went to jail, he assumed
7 responsibility for the operation, and defendant had nothing further to do with it. Thus, defendant
8 was no longer associated with the ring when Aponik and Jarett Elm were arrested June 18, 2005,
9 attempting to pick up a package containing 114 grams of ice mailed by Espinosa.

10 The government is puzzled why the U.S. Probation Office has not recommended any role
11 enhancement for defendant, when it recommended a 2-level upward adjustment for both Aponik
12 and Canovas. Defendant started this drug trafficking ring when he proposed to Canovas that they
13 go out on their own. By January, 2005, there were at least five participants associated with his
14 operation: Canovas, Espinosa, their Las Vegas source, John Cruz and Eric Aponik. As the
15 organizer, defendant should receive a four-level enhancement. Accordingly, his total offense
16 level should be 34, with a Criminal History Category of IV, which results in a sentence of
17 between 210-262 months.

RESPECTFULLY SUBMITTED this 29th day of August, 20006.

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and NMI

By: Karon V. Johnson
KARON V. JOHNSON
Assistant U.S. Attorney

Financial Transactions (Count 8-19)

SUMMARY OF MONEY EXCHANGED THROUGH BANK OF GUAM

ENRIQUE A. CANOVAS
OR CHRISTINE T. CANOVAS
1640 RTE 16
DEDEDO GUAM 96929-6533

ACCOUNT # 202214688

10/13/2004	\$1,000.00	Jonathan Canovas Bank of Guam	202214688	Brian Elm
11/6/2004	\$800.00	Jonathan Canovas Bank of Guam	202214688	Eric Aponik
11/8/2004	\$800.00	Jonathan Canovas Bank of Guam	202214688	Eric Aponik
11/9/2004	\$1,600.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
11/26/2004	\$800.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
12/23/2004	\$800.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
1/3/2005	\$2,950.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
1/18/2005	\$1,000.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
2/3/2005	\$1,000.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
2/4/2005	\$500.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
2/18/2005	\$1,900.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik
2/25/2005	\$2,000.00	Bank of Guam Jonathan Canovas	202214688	Eric Aponik

DATE	TRACER	DESCRIPTION	AMOUNT
10-04	4	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	1600.00
10-13	10-15	SAVINGS DEPOSIT Nov 18, 2004 – Aponik acquires P.O. Box	1.00
10-19	4	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	800.00
10-23	4	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	800.00
10-25	4	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	2950.00
1-18	37	SAVINGS DEPOSIT EDS SERVICE CHARGE	1000.00
2-03	13	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	1000.00
2-03	5	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	1.00
2-04	29	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	500.00
2-04	4	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	.50
2-18	26	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	1900.00
2-25	48	SAVINGS DEPOSIT 1000 N. GREEN VY PKWY	2000.00

PERSONAL/FIDUCIARY
Bank of Guam
The Local Bank. The People's Bank.

ACCOUNT OWNER: ENRIQUE, OR OR M. CHRISTINE OR JONATHAN	ACCOUNT NUMBER: 0202-214688	PHONE NUMBER: 1
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DEPOSIT ACCOUNT AGREEMENT AND SIGNATURE CARD

**ANALYSIS OF DEPOSITS AND
KNOWN COMMUNICATIONS BETWEEN ELM, APONIK & CANOVAS**

\$\$ Transfers

10/10/04

\$1,000 Bk/G

Canovas to Elm 12:38 p.m. 3 sec.

1)

10/13/04

\$1,000 Bk/G

Canovas to Elm 9:48 a.m. 6 min

10/25/04

Canovas to Elm 8:56 a.m. 30 sec.

10/25/04

Canovas to Elm 10:17 a.m. 3 min

2)

10/25/04

\$1,000 Bk/G

Aponik's phone to Canovas 11:36 p.m. 1 min

10/30/04

Aponik's phone to Canovas 8:56 a.m. 1 min

10/30/04

Canovas to Elm 11:16 a.m. 2.5 min

11/04/04

Canovas to Elm 11:13 a.m. 5.5

11/05/04

Canovas to Elm 11:04 a.m. 2 min

11/05/04

Aponik's phone to Canovas 6:33 p.m. 2.4

11/06/04

Aponik's phone to Canovas 9:22 a.m. 1

11/06/04

Aponik's phone to Canovas 9:49 a.m. 1

11/06/04

Canovas to Elm 12:25 p.m. 1.5

3)

11/06/04

\$800 Bk/G

Aponik's phone to Canovas 9:00 p.m. 6.2

4)

11/08/04

\$800 Bk/G

Aponik's phone to Canovas 11:16 a.m. 6.2

11/09/04

Canovas to Elm 11:28 a.m. 6.5

EXHIBIT

26

11/11/04 Aponik's phone to Canovas 9:50 a.m.
Canovas to Elm 11:16 a.m. **5 sec.**
11/12/04 Aponik's phone to Canovas 4:10 p.m.

11/13/04

11/14/04

11/15/04

11/16/04

11/17/04

11/18/04

11/19/04

11/20/04

11/21/04

11/22/04

11/23/04

11/24/04

11/25/04

11/26/04

11/27/04

11/28/04

11/29/04

11/30/04

11/31/04

12/01/04

12/02/04

12/03/04

12/04/04

12/05/04

12/06/04

12/07/04

12/08/04

12/09/04

12/10/04

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12/13/04

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12/16/04

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12/29/04

12/30/04

12/31/04

12/01/05

12/02/05

12/03/05

12/04/05

12/05/05

12/06/05

12/07/05

12/08/05

12/09/05

11

EXHIBIT 2

ANALYSIS OF CALLS, CRUZ TO/FROM ELM, APONIK

11/06/04	Cruz to Elm	2:13 p.m.
	Cruz to Elm	2:47 p.m.
	Cruz to Elm	7:31 p.m.
11/19/04	Cruz to Elm	8:47 p.m.
01/03/05	Cruz to Elm	2:15 p.m.
01/05/05	Cruz to Elm	10:00 a.m.
01/05/05	Cruz to Elm	10:07 a.m.
01/06/05	Cruz to Elm	8:59 a.m.
01/07/05	Cruz to Elm	11:31 a.m.
01/07/05	Cruz to Elm	1:13 p.m.
01/21/05	Cruz to Elm	1:25 p.m.
01/21/05	Cruz to Elm	1:42 p.m.
02/01/05	Cruz to Elm	12:42 p.m.
02/02/05	Elm to Cruz	10:18 a.m.
02/11/05	Elm to Cruz	7:05 p.m.
02/12/05	Cruz to Elm	12:13 p.m.
02/12/05	Cruz to Elm	12:24 p.m.
02/12/05	Elm to Cruz	1:23 p.m.
02/12/05	Cruz to Elm	1:31 p.m.
02/12/05	Cruz to Elm	1:35 p.m.
02/20/05	Cruz to Elm	11:35 a.m.
02/20/05	Elm to Cruz	11:36 a.m.
02/21/05	Elm to Cruz	1:10 p.m.
02/21/05	Cruz to Elm	5:07 p.m.
02/21/05	Elm to Cruz	5:10 p.m.
02/21/05	Cruz to Elm	5:46 p.m.
02/21/05	Cruz to Elm	8:35 p.m.
02/23/05	Elm to Cruz	11:00 a.m.
<u>Elm incarcerated 03/18/05</u>		
02/23/05	Cruz to Elm	2:11 p.m.
02/23/05	Elm to Cruz	7:33 p.m.
02/23/05	Cruz to Elm	8:51 p.m.
02/23/05	Elm to Cruz	10:28 p.m.
02/23/05	Elm to Cruz	11:47 p.m.
02/24/05	Cruz to Elm	12:02 p.m.
02/24/05	Cruz to Elm	4:33 p.m.
02/24/05	Cruz to Elm	7:02 p.m.
02/24/05	Cruz to Elm	8:16 p.m.
02/24/05	Elm to Cruz	9:54 p.m.
02/26/05	Elm to Cruz	11:48 p.m.
02/28/05	Cruz to Elm	5:25 p.m.
02/28/05	Cruz to Elm	7:30 p.m.
03/06/05	Elm to Cruz	12:30 a.m.
03/10/05	Elm to Cruz	8:05 p.m.
03/10/05	Cruz to Elm	10:02 p.m.
03/12/05	Elm to Cruz	11:03 a.m.
03/12/05	Cruz to Elm	11:31 a.m.
03/12/05	Elm to Cruz	12:19 p.m.
03/12/05	Elm to Cruz	2:18 p.m.
03/12/05	Elm to Cruz	3:13 p.m.
03/15/05	Cruz to Aponik	3:18 p.m.
03/15/05	Cruz to Aponik	2:32 p.m.

GOVERNMENT
EXHIBIT
28

EXHIBIT 3

(12)

\$800 Deposit to BOG 12/23/04

12/24/04	Canovas to Elm	3:12 p.m.
12/24/04	Aponik's phone to Canovas	4:19 p.m.
12/25/04	Aponik's phone to Canovas	11:50 a.m.
12/26/04	Aponik's phone to Canovas	4:19 p.m.
12/26/04	Canovas to Elm	5:51 p.m.
12/27/04	Aponik's phone to Canovas	12:05 p.m.
12/28/04	Canovas to Elm	8:35 a.m.
12/28/04	Canovas to Elm	12:25 p.m.
12/29/04	Aponik's phone to Canovas	12:31 p.m.
12/31/04	Canovas to Elm	9:12 a.m.
12/31/04	Aponik's phone to Canovas	11:07 a.m.
01/01/05	Aponik's phone to Canovas	8:22 p.m.
01/01/05	Canovas to Elm	10:41 p.m.

1st Box \$6,000
1/2/05 \$3,000 Western Union Wire - Espinosa
1/3/05 \$3,000 Deposit to Bank of Guam - Canovas

2nd Box \$12,000

1/1/05	\$2,000 Western Union Wire - Canovas
1/18/05	\$1,000 Deposit to Bank of Guam – Canovas
1/29/05	<u>\$3,000</u> Western Union Wire – Canovas
1/14/05	\$6,000 total to Canovas
	\$6,000 [\$5,700] Wire to Bank of Hawaii – Espinosa

3rd Box \$6,000

2/3/05	\$1,000 Deposit to Bank of Guam – Canovas
2/18/05	\$1,900 Deposit to Bank of Guam – Canovas
2/9/05	\$3,000 Western Union Wire – Espinosa

4th Box \$9,000

2/18/05	\$1,900 Deposit to Bank of Guam – Canovas
2/25/05	\$2,000 Deposit to Bank of Guam - Canovas
3/3/05	\$5,000 Deposit to Bank of Guam – Canovas

5th Box 4/5/05 \$7,925 Western Union Wire – Espinosa